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No. _____

SUPREME COURT OF THE UNITED STATES

October Term, 1993

ANDREW LEO LOPEZ,

Petitioner,

vs.

BEHLES, *et al.*,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S PETITION FOR *WRIT OF CERTIORARI*

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65 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether or not Petitioner had standing to appeal orders of the Bankruptcy Court where he became a creditor of the estates pursuant to his professional employment under 11 U.S.C. § 327 and his compensation bears a priority under 11 U.S.C. § 507(a)(1) and shall be allowed under 11 U.S.C. § 503(b)(4) pursuant to 11 U.S.C. §§ 501(a) & 502(a);

2. Whether due process of law and equal protection of the laws is violated by court action where lower courts fail to uphold Petitioner's contractual rights as a professional employee who was employed pursuant to the United States Bankruptcy Code and which terms are contained in the order of employment.

3. Whether due process of law and equal protection of the laws is violated by court action where lower courts impose duties on Petitioner as a Certified Public Accountant, but left Petitioner without standing [means] to discharge his professional duties.

PARTIES TO THE PROCEEDINGS BELOW

Appellees and Respondents in Lopez v. Behles *et al.* are Daniel J. Behles Bankruptcy Trustee for American Ready Mix, Inc., and American Sand and Gravel, Inc. D/B/A Albuquerque Sand and Gravel, Inc. [Jointly Administered], and Western Bank.

American Ready Mix, Inc. and American Sand and Gravel are debtors under the United States Bankruptcy Code which have no parents or subsidiaries and are not parties to this action.

There are no other corporate parents or subsidiaries which are parties to this action.

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OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Tenth Circuit In Re American Ready Mix, Inc., 14 F.3d 1497 (1994) is set forth in Appendix A hereto and the opinion and judgment of the United States Court of Appeals for the Tenth Circuit entered April 28, 1994, is set forth in Appendix B hereto.

JURISDICTION

The Orders and Judgments of the Tenth Circuit of four related bankruptcy appeals were entered February 2, 1994, and April 28, 1994, respectively. The Court granted [April 22, 1994] an extension of time [A885] within which to file a Petition for a *Writ of Certiorari* to the United States Court of Appeals for the Tenth Circuit until June 2, 1994 and this Petition was filed within that date.

Therefore, this court's jurisdiction is invoked pursuant to: 28 U.S.C. §§§ 1293(b), 1651(a), 2101(c).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Article I, § 8, Clause 4.

> "[The Congress shall have Power] to establish a uniform Rule of Naturalization, and uniform laws on the subject of Bankruptcies throughout the United States;"

Constitution of the United States, Article III, § 1:

> "The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish;"

Constitution of the United States, Article III, § 2:

> "The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States...."

Constitution of the United States, Fourteenth Amendment, § 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES INVOLVED

Because of their length, Petitioner presents only citations of statutes involved and verbatim contents appear at Appendix C:

11 U.S.C. § 101(5)

11 U.S.C. § 101(10)(A)

11 U.S.C. § 101(14)(E)

11 U.S.C. § 301

11 U.S.C. § 327(a)

11 U.S.C. § 348(a)

11 U.S.C. § 362

11 U.S.C. § 363(b)(1)

11 U.S.C. § 501(a)

11 U.S.C. § 502(a)

11 U.S.C. § 503(b)(4)

11 U.S.C. § 507(a)(1)

11 U.S.C. § 1109(b)

28 U.S.C. § 455(a)

28 U.S.C. § 455(b)(1)

28 U.S.C. § 1293(b)

28 U.S.C. § 1651(a)

STATEMENT OF THE CASE

Two corporations with shared stockholders [Brother/Sister] filed petitions for reorganization pursuant to 11 U.S.C. § 301. The larger of the two produced and sold ready-mixed concrete for use by the construction industry. The smaller produced sand and gravel, most of which was sold to the larger and the remainder to third parties. The companies did almost $5,000,000 per year of business, employed approximately 70 people, and were one of the

largest privately held companies in New Mexico and were substantially owned and operated by Hispanic minorities.

Upon motion by the Taxation and Revenue Department of New Mexico, joined by the Internal Revenue Service and after notice and hearing, the Court ordered conversion of the petition from reorganization to liquidation under Chapter 7 of the Bankruptcy Code and operation of the business until they could be sold in order to satisfy secured and unsecured claims.

Accordingly, a trustee was employed and he in turn employed lawyers and an accountant. Instead of operating the debtors until they could be sold, he abandoned the key assets [land, offices, production facilities and trucks] of the ready-mix operation in a way that the former debtor-in-possession could obtain them to start a new company free of liens and without any payment to the estate. The trustee also abandoned not only the mining equipment of the sand and gravel operation, but the entire

going concern which also ended up in the hands of the former debtor-in-possession without payment to the estate for the benefit of the creditors.

The trustee abandoned both sets of assets without notice to the creditors, without appraisals, and without any, but the most perfunctory, attempt to sell the assets for fair market value. In the case of the sand and gravel the collusion and fraud among the parties to the transaction were so blatant that the bank which held the assets as collateral provided unadvertised financing during a sham public offering of the assets without public notice at attractive terms to the debtor-in-possession who was the guarantor of the original note.

Moreover, the trustee [See Application for Extension of Time A885 at Exhibit B] who was looting the estate to the detriment of the creditors improperly failed to disclose an impermissible conflict of interest which would have disqualified him pursuant to 11 U.S.C. §

101(13)(E).

The trustee hired his office mate to be the accountant for the estates and he too failed to disclose a disqualifying conflict and he performed an analysis that was used to justify abandonment of the sand and gravel business that was egregiously incompetent and a fraud on the court.

Petitioner who was properly employed [See Appendix A at p. 10] during the voluntary portion of the petition pursuant to 11 U.S.C. § 327(a) became a creditor pursuant to 11 U.S.C.§ 101(10)(A) after the court entered an order to convert the debtors pursuant to 11 U.S.C. § 348(a). Petitioner's claim, 11 U.S.C. § 101(5), bears a priority pursuant to 11 U.S.C. § 507(a)(1) which shall be allowed pursuant to 11 U.S.C. § 503(b)(4) and Petitioner filed his proof of claim pursuant to 11 U.S.C. § 501(a) and there were no objections, 11 U.S.C. § 502(a), from anyone including the trustee who has also confirmed in open court that Petitioner

is a creditor of both estates by his testimony in open court which averment must be taken as true. See In Re *Herrera*, 23 B.R. 796 (Bkrtcy App. 9th Cir. 1982). The Opinion [Appendix A at p. 8] suggests that the trustee disputes Petitioner's status as a creditor. The sixth lawyer for the trustee for the first time and in an appellate pleading claimed that Petitioner was not a creditor solely because he had not filed his claim. The misstatement of fact was manifestly erroneous and none of Petitioner's allegations of fact or averments have ever been denied, disputed or otherwise objected to by any party in interest in any responsive pleading. Undenied averments must be accepted as true. *Citizen's National Bank v. Davisson*, 229 U.S. 212 (1913). The manifest error in the decision [Appendix A at p. 8] at issue incorrectly finds that the Petitioner was not a creditor pursuant to 11 U.S.C. § 101(10); however the Appellate Court did not read through to 11 U.S.C. § 101(10)(A) or consider 11 U.S.C. § 348 and

demonstrated its confusion by Note 3 [Appendix A at p. 8].

In order to protect his interests Petitioner objected to several actions taken by the trustee and moved for recusal of the Bankruptcy Judge pursuant to 28 U.S.C. § 455(a) and § 455(b)(1) on the grounds that the judge had demonstrated manifest bias and had made a wrongful conversion of the estates from reorganization to liquidation and had sought to legitimize and mask the truth of the wrongful conversion with specious findings of fact and conclusions of law. This latter averment has never been denied or rebutted by any of approximately 350 parties in interest including the Bankruptcy Court itself, the District Court, the Appellate Court, the U.S. Trustee, the bankruptcy trustee. ***Citizens National Bank***.

Accordingly, Petitioner appealed four different orders to the District Court and successfully moved to have them all adjudicated in one court in order to consider one appeal in

four parts, effect judicial economies, and present the full factual topography before a single district court. The court assigned the appeals to a magistrate court for administration and ministerial duties but in fact the magistrate ended up ruling against Petitioner on all the appeals and Petitioner appealed to the United States Court of Appeals for the Tenth Circuit.

During proceedings in district and magistrate court only the Chapter 7 trustee and Western Bank filed briefs and notices of appearance. Both argued mootness and lack of stay and moved for dismissal. None argued lack of standing at this level of appeal.

Standing became an issue *sua sponte* when the Tenth Circuit ordered briefs on the matter and the Tenth Circuit evaded ruling on the facts and evidence which remain uncontested and incontrovertible, ***Citizens***, by ruling that Petitioner lacked standing to prosecute his appeals.

For judicial notice Petitioner comes before this Court *Pro Se* because no member of the Bankruptcy Bar in New Mexico would risk the wrath of the Rose Bankruptcy Court by representation of Petitioner in these appeals.

REASONS FOR GRANTING THE *WRIT*

1. THE JURISDICTION OF THIS COURT IS PROPERLY INVOKED.

The appeals arose from two bankruptcy petitions pursuant to 11 U.S.C. § 301 which then went to District Court, Magistrate Court and Appellate Court.

The final judgments below were filed February 3, 1994 [three of four related appeals] and April 28, 1994 [fourth of four related appeals] and the court granted an extension of time [A885] within which to file for a *Writ of Certiorari* pursuant to 28 U.S.C. § 2101(c).

Further, this proceeding is governed by 28 U.S.C. § 1651(a) *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 26 and the cases and controversies presented below arise from 11 U.S.C. § 101 *et*

seq. [The Bankruptcy Code].

Moreover, "Supreme Court will grant certiorari to resolve conflict of decisions [as here] of federal courts in different circuits...." *Baker*, 417 U.S. 467 (1974).

Finally, the issues presented herein affect millions of bankruptcy petitions in process, the published opinion in question promises to wreak havoc in bankruptcy administration, the prospect of untold litigation arises from the ruling in question and debtors, creditors, professional employees, and creditors now face enormous and unnecessary uncertainties regarding professional employment in bankruptcy, fees, and the rights of professional employees under the priorities codified in the Bankruptcy Code.

Therefore, this Court should issue a *Writ*.

2. DECISIONS BELOW CONFLICT WITH DECISIONS OF SIMILAR MATTERS OF OTHER UNITED STATES COURTS OF APPEALS.

Property

The trustee abandoned the assets necessary

and sufficient to reconstitute the debtors without any payment to the estates and without any but the most perfunctory attempt to obtain maximum value to the estates. There was thus no residual value for the creditors to satisfy any portion of their claims. Worse, the abandonments were executed in such a manner that former debtor-in-possession ended up with possession and use of the assets free of liens and without obligation to the estates' creditors including the IRS, the Resolution Trust Corporation and which claims exceeded $4,000,000 of secured and unsecured debt including administrative claims.

"Courts properly entertain [appeals] challenging the equity of a bankruptcy sale transaction, on the assumption that sales tinged by fraud, mistake, or unfairness would generally result in an accepted bid below that which might have been expected in a fair free market situation" In Re *Harwald Company*, 497 F.2d at 444 (7th Cir. 1974). "Thus, when a [creditor]

attacks a bankruptcy sale on equitable grounds related to the intrinsic structure of the sale, he brings himself within the zone of interests which the Bankruptcy Act seeks to protect and to regulate." *Mason v. Ashbeck*, 383 F.2d 779 (10th Cir. 1967); *Webster v. Barnes Banking Co.*, 113 F.2d 1003 (10th Cir. 1940). The decision below does not even apply the Tenth Circuit's own prior rulings on the matter.

The decision below holds that "direct" means only those who are party to a formal document such as a mortgage have standing to appeal. Further, the decision holds that direct pecuniary interest, only indirect, cannot arise from payments into or expenditures from a bankruptcy estate [Appendix A at p. 13]. All creditors pre and post petition, secured, or unsecured and administrative are as straws drawing from the same container and may do so only in accordance with the *schema* codified by Congress in the Bankruptcy Code pursuant to 11 U.S.C. § 507 *et seq*.

The Ninth Circuit held that in a case involving competing claims to a limited fund, a claimant has standing to appeal an order disposing of assets from which the claimant seeks to be paid. In Re *International Environmental Dynamics, Inc.*, 718 F.2d 322, 326 (9th Cir. 1983) quoting with favor *Klein v. Rancho Montana de Oro, Inc.*, 263 F.2d 764 (9th Cir. 1959) and the Bankruptcy Court for the Eastern District of New York, In Re *Sapolin Paints Inc.*, 11 B.R. 930, 936 (1981), ruled that, "a single creditor has sufficient interest to have an order authorizing a sale reviewed, and if appropriate reversed." See also *United States v. Goodstein*, 883 F.2d 1362, 1366 (7th Cir. 1989) cert denied, 494 U.S. 1007; In Re *Gavalier*, 142 B.R. 710, 714 (Bkrtcy. E.S. Pa 1992).

Therefore, the decision below conflicts with decisions in other appellate courts and a *Writ* should issue. ***Baker***.

Trustee

A bankruptcy trustee, even one whose very employment is in dispute, is a fiduciary of the estate's creditors, and his duty to collect and "conserve the assets of the estate and to maximize distribution to creditors" is a fiduciary obligation. In Re *Benny*, 29 B.R. 754, 760 (D.C. N.D. Cal 1983).

Further, the objectives of federal bankruptcy law can be broadly stated to provide for an equitable settling of creditors' accounts by usurping from the debtor his power to control distribution of his assets, *Matter of Quanta Resources Corp.*, 739 F.2d 912, 915 (3rd Cir. 1984) and the trustee must collect the debtor's assets for the estate, reduce the assets to money, and distribute the property of the estate. *Id.*

Therefore, Petitioner's status as a creditor, with a valid claim on the assets of the estates, is a dollars and cents matter sufficient to establish standing to appeal the

trustee's wrongful acts.

Trustee and 11 U.S.C. § 1109(b)

While this section does not explicitly give an individual creditor the right to prosecute claims on behalf of the estate, cases interpreting the section have found such a right is implied. Matter of *Shelby Motel Group, Inc.*, 123 B.R. 98 at 101 (N.D. Ala 1990) "Who could be better to prosecute claims on behalf of a debtor under 1109(b) than a badly harmed creditor?" *Id.* at 103.

When a trustee fails to prosecute an action or an issue [as here where the estates have numerous claims against others] a creditor may prosecute in his stead, Matter of *Anderson* 15 B.R. at 345 (Bkrtcy. N.D. Mo 1981), and an appellant has standing to appeal based upon [as here] his interest that arose from the trustee's settling of suits for less than what would be needed to create a surplus. Matter of *Andrerccetti*, 975 F.2d 413 (7th Cir. 1992).

Further, when a debtor-in-possession [as

here] breaches its [sic] statutory duty a creditor may bring action in the debtor's name or even act to remove the trustee. See Matter of *Monsour Medical Center* 5 B.R. 715, 717-178 (Bkrtcy. W.D. Pa 1980).

Therefore, the decision below conflicts with decisions in other federal courts and other appellate courts and a *Writ* should issue. ***Baker***.

Trustee and Fed. R. Civ. P. 24(a)(2)

In addition to the failings *supra* the trustee failed to give notice of abandonment to any but the collaborators in the proposed transactions pursuant to 11 U.S.C. §363(b) and Bankruptcy Rule § 2002(b). By the express language of F.R.B.P. § 2002(a)(2) the "parties in interest" for purposes of § 363(b) include "all creditors" and notice must be provided In Re *Globe Invest. & Loan Co.*, 867 F.2d 556, 560 (9th Cir. 1989) and a single creditor has sufficient interest ***Sapolin*** to have an order reviewed and if appropriate reversed. ***Goodstein***

at 1366.

Because there were no proceeds or even an attempt to maximize proceeds by a sale at fair market value Petitioner's rights were directly and adversely affected pecuniarily by the order of the Bankruptcy Court which lifted the stay pursuant to 11 U.S.C. § 362 and ordered abandonment. In Re *Goodwin's Discount Furniture, Inc.*, 16 B.R. 885, 888 (Bankr. 1st Cir. 1982).

Moreover, the Due Process clause of the Fourteenth Amendment as interpreted by *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, and *Mennonite Board of Missions v. Adams*, 462 U.S. 791 in general require actual notice to an affected party whose name and address are "reasonably ascertainable." *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478.

Further, if Petitioner prevails all of the creditors will be sufficiently benefitted that the suit ought to be allowed to proceed, *STN*, 779 F.2d at 905 (2nd Cir. 1985), and Petitioner

has minimally shown that representation [trustee and debtor-in-possession] "may" be inadequate (citations omitted).

In addition, 28 U.S.C. § 1293(b) permits appeals by agreement among the parties and the decision below [Appendix A at p. 15] is manifestly incorrect. Petitioner gave notice of appeal, filed his briefs in District Court, served papers, and the parties responded by filing briefs, filing other papers and attending conferences. Therefore, all parties consented to these appeals and the decision below conflicts with constructive application of 28 U.S.C. § 1293(b).

Because Petitioner is a proper intervenor, pursuant to Fed. R. Civ. P. 24(a)(2) and under 28 U.S.C. § 1293(b) the decision below conflicts with those of other circuits which have considered the matter (citations omitted), this Court should issue a *Writ*.

Accountant

The estates under Chapter 7 of the

Bankruptcy Code employed an accountant who failed the disinterested test pursuant to 11 U.S.C. § 101(14)(E). The Appellate Court ignored uncontested averments and evidence and instead ruled that Petitioner had no standing to appeal an order paying fees to the accountant hired by the trustee. A new accountant became necessary in order for Petitioner to comply with ethical canons affecting conflicts after the debtors left Chapter 11 to Chapter 7 of the Bankruptcy Code.

Petitioner is a creditor harmed by any diminution of the assets of the estate who thereby has standing to appeal any ruling affecting the estate's ability to pay administrative claims ***Sapolin***, and Petitioner has a right to appeal and if warranted have the order reversed. ***Goodstein***.

Because the decision below conflicts with those on similar matters of other circuits, this Court should issue a *Writ*.

Magistrate Jurisdiction

A district court may not refer a bankruptcy action to magistrate for decision. In Re *Elcona Homes Corp.*, 810 F.2d 136 (7th Cir. 1987), and Petitioner raised the issue of magistrate misconduct for the first time on appeal because there was no previous opportunity to raise the issue before the appeals decided by the magistrate court instead of the district court. Raising an issue on appeal is proper where there is no opportunity to make a timely objection in the court below. In Re *Novak*, 639 F.2d 1274 (5th Cir. 1981).

The decision below holds that the court would not consider the issue even though there is an exception to the rule that precludes consideration of claims for the first time on appeal, where refusal to consider the issue would result in a miscarriage of justice, *Calmaquip Engineering West Hemisphere Corp. v. West Coast Carriers Ltd.*, 650 F.2d 633 (5th Cir. 1981); In Re *Corrugated Container Antitrust*

Litigation, 647 F.2d 460 (5th Cir. 1981), and "Rules of Practice and Procedure are devised to promote the ends of justice, not defeat them." *Hormel v. Helvering*, 312 U.S. 552 at 557.

Therefore, this Court should issue a *Writ*.

3. **UNITED STATES COURT OF APPEALS DECIDED IMPORTANT FEDERAL QUESTIONS WHICH HAD NOT BUT SHOULD BE SETTLED BY THIS COURT.**

Disqualification of Bankruptcy Judge

Petitioner moved to disqualify the Bankruptcy Judge as a creditor and professional employee of the estates pursuant to 28 U.S.C. § 455(a) which applies to bankruptcy judges. *Pilla v. American Bar Ass'n.*, 542 F.2d 56, 58 (8th Cir. 1976); *13 Wright, Miller & Cooper* § 3542, and 455(b)(1).

The Bankruptcy Court denied the motion and Petitioner appealed first to District Court and then to the Tenth Circuit which could find no published cases in support of Petitioner [Appendix A at p. 11] and ruled that Petitioner did not have standing to appeal his own motion

to recuse even though there were no disputed facts by anyone including the bankruptcy court and the decision below [Appendix A at p. 10] incorrectly states that uncontested factual allegations need not be taken as true at the appellate level. ***Citizen's National Bank***. The Petitioner was a professional employee and creditor by virtue of his employment with a valid claim. See *13 Wright, Miller & Cooper*, Federal Practice and Procedure; Jurisdiction § 3549.

The rights of professional employees under the Bankruptcy Code pursuant to the Due Process Clause of the Fourteenth Amendment with regard to a fair impartial tribunal are so important to millions of bankruptcy petitions in process where almost every estate employs at least one professional employee, that this Court should review the matter and issue a *Writ*.

Finally, the *All Writs Act* grants the federal courts the power to issue "all writs necessary or appropriate in and of their

respective jurisdictions and arguable to the usages and principles of law," *Roche*.

Therefore, this Court should issue a *Writ*.

Accountants and Courts

This case is not about standing or disputes on the facts. It is about a court system that is dominated by lawyers who will not go where the accusing finger points.

Petitioner [MBA Stanford '73 and CPA: Texas, New Mexico, and California] reviewed the trends in recent court decisions that generally impose the duty of social conscience (citations omitted) upon Certified Public Accountants and exact money judgments whenever a CPA is found to have failed his duty to inform the appropriate parties and authorities of wrongdoing that comes before them during the discharge of their professional services.

The decision below exempts the courts from the scrutiny they expect of CPAs for others. The courts, therefore, have made law and exempted themselves.

The matter should be decided by this Court as a Fourteenth Amendment issue.

4. DECISION BELOW CONFLICTS WITH PRIOR DECISIONS OF THIS COURT ON THE SAME ISSUE.

Standing

The need to limit standing to appeal in bankruptcy proceedings springs from the nature of bankruptcy litigation which almost always involves the interests of persons who are not formally parties to the litigation. See Matter of *Fondiller*, 707 F.2d 441, 443 (9th Cir. 1983).

However, Petitioner was a professional employee whose interests were codified by Congress and who was more than just a concerned bystander, *United States v. SCRAP*, 412 U.S. 669, 687 (1973), and who had a legally protected interest, *Flast v. Cohen*, 392 U.S. at 101-106, which is much more than an identifiable trifle, *SCRAP* at 689 N.24 and his actual or threatened injury may exist solely by virtue of statutes creating legal rights, the invasion of which

creates standing...." See *Linda R. S. v. Richard S.*, 410 U.S. 614, 617.

Petitioner, "asserts his own legal interests, rather than those of third parties, *Warth v. Seldin*, 422 U.S. at 499 and his claim for relief clearly falls within that zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Service Orgs. v. Camp*, 397 U.S. 150, 153 (1970). In such instances the Court has found, in effect, that the constitutional or statutory provision in question implies a right of action in the [Petitioner]. See *Pierce v. Society of Sisters v. Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1967).

Therefore, this Court should issue a *Writ*.

CONCLUSION

The United States Court of Appeals for the Tenth Circuit misconstrued facts, misapplied case law, decided contrary to case law from its own court, decided contrary to decisions from

other circuits on the same facts and issues, ***Baker***, and there are important Federal issues which affect millions of bankruptcy cases in process and billions in assets; therefore, "*Certiorari* and not appeal [is] proper method of reviewing decision[s] of court of appeals wherein it exercised its power to superintend and revise in bankruptcy." See *Holden v. Stratton* 191 U.S. 115 (1903).

Wherefore, Petitioner respectfully prays the Court for a *Writ of Certiorari* to the United States Court of Appeals for the Tenth Circuit, stay pending resolution of the *Writ* publication of the opinion under review, reversal of the judgment of United States Court of Appeals for the the Tenth Circuit, and such other and further relief as the Court may find just under these premises.

Respectfully submitted,

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APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

In re: AMERICAN READY MIX, INC., Debtor, and ALBUQUERQUE SAND & GRAVEL, INC., d/b/a AMERICAN SAND & GRAVEL, INC., Debtor.	)	
ANDREW LEO LOPEZ, Appellant, v. DANIEL J. BEHLES, Trustee, Appellee.	)	No. 93-2042
In re: AMERICAN READY MIX, INC., Debtor, and ALBUQUERQUE SAND & GRAVEL, INC., d/b/a AMERICAN SAND & GRAVEL, INC., Debtor.	)	

ANDREW LEO LOPEZ,	)	
	)	
Appellant,	)	
	)	
v.	)	No. 93-2141
	)	
DANIEL J. BEHLES, Trustee,	)	
	)	
Appellee.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
(D.C. Nos. CIV-91-482-JP and CIV-91-110-JB)

Submitted on the briefs:

Andrew Leo Lopez, pro se.

Karen A. Hasselstrom of Behles & Associates, Albuquerque, New Mexico, for Appellee in case No. 93-2042.

George Moore Moore of Behles & Associates, Albuquerque, New Mexico, for Appellee in case No. 93-2141.

Before TACHA and KELLY, Circuit Judges, and BROWN,* District Judge.

*Honorable Wesley E. Brown, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.

TACHA, Circuit Judge.

Appellant Andrew Leo Lopez, representing himself, appeals from three orders of the district court affirming three orders of the bankruptcy court. The parties addressed the two issues in No. 93-2042 in two sets of briefs, one set for each issue. To keep the issues separate, we will refer to them as "No. 93-2042A" and "No. 93-2042B." In No. 93-2042A, Mr. Lopez challenges a bankruptcy court order that denied his motion to recuse or disqualify the bankruptcy judge pursuant to Rule 5004 of the Bankruptcy Code and 28 U.S.C. § 455(a) and (b)(1). R., Doc. 1, attachment A. In No. 93-2042B, Mr. Lopez challenges a bankruptcy court order that lifted the automatic stay as to Val & Sons, Inc. and Valentin and Marjorie Trujillo, so that Val & Sons could foreclose on its mortgage on certain real property belonging to the American Ready Mix estate. Id., attachment B. In No. 93-2141, Mr. Lopez challenges a bankruptcy court order that authorized the payment of fees to the accountant for the

Chapter 7 trustee. Because we conclude that we lack jurisdiction over these appeals, we dismiss. Construing the appeal in No. 93-2042A as a petition for a writ of mandamus, we deny relief.[1]

JURISDICTION

It is well-settled that this court has an independent duty to inquire into its jurisdiction over a dispute, even where neither party contests it and the parties are prepared to concede it. See Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986). As the appellant, it was Mr. Lopez's duty to establish and include in each opening brief a statement of this court's jurisdiction to consider his appeals. Fed. R. App. P. 28(a)(2).

1. Finality--No. 93-2042A

In No. 93-2042A, Mr. Lopez appeals from an

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[1] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of these appeals. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cases are therefore ordered submitted without oral argument.

order of the bankruptcy court denying his motion to recuse or disqualify the bankruptcy judge. An order denying a motion to recuse or disqualify a judge is interlocutory, not final, and is not immediately appealable. See Alexander v. Primerica Holdings, Inc., No. 93-5433, 1993 WL 486346, at *7 (3d Cir. Nov. 29, 1993)[2] (noting that most circuit courts recognize "necessity and propriety of interlocutory review of disqualification issues"). Mandamus is an appropriate means of reviewing a judge's refusal to disqualify him- or herself, however. Id.; see also Frates v. Weinshienk, 882 F.2d 1502, 1503-04 (10th Cir. 1989), cert. denied, 494 U.S. 1004 (1990). Even if we construe the appeal as a petition for mandamus, Mr. Lopez nevertheless has failed to

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[2] In bankruptcy proceedings, an order is final and appealable when it disposes of a "'particular adversary proceeding or discrete controversy pursued within the broader framework cast by the petition.'" Cascade Energy & Metals Corp. v. Banks (In re Cascade Energy & Metals Corp.), 956 F.2d 935, 938-39 (10th Cir. 1992) (quoting Adelman v. Fourth Nat'l Bank & Trust Co. (In re Durability, Inc.), 893 F.2d 264, 266 (10th Cir. 1990)).

demonstrate his entitlement to relief. A threshold question is whether Mr. Lopez has standing to challenge the bankruptcy judge's refusal to recuse himself. The question of standing is also common to the orders appealed from in Nos. 93-2042B and 93-2141.

2. Standing

The Bankruptcy Code of 1978, 11 U.S.C. § 101 et seq., does not contain an explicit grant or limitation on appellate standing. Relying on pre-Code law, however, a number of courts, including this one, Holmes v. Silver Wings Aviation, Inc., 881 F.2d 939, 940 (10th Cir. 1989), have adopted a standard that requires an appellant to show that he is a "person aggrieved" by the challenged bankruptcy court order. That is, only a person "whose rights or interests are directly and adversely affected pecuniarily by the decree or order of the bankruptcy court" may appeal. Id. at 940 (citing Fondiller v. Robertson (In re Fondiller), 707 F.2d 441, 442-43 (9th Cir. 1989)

(internal quotations and other citations omitted). "Litigants are 'persons aggrieved' if the order [appealed from] diminishes their property, increases their burdens, or impairs their rights." GMAC v. Dykes (In re Dykes), No. 93-7235, 1993 WL 490865, at *3 (3d Cir. Nov. 30, 1993) (citing Fondiller, 707 F.2d at 442). The "person aggrieved" test is meant to be a limitation on appellate standing in order to avoid "endless appeals brought by a myriad of parties who are indirectly affected by every bankruptcy court order." Holmes, 881 F.2d at 940.

If there is a dispute in the relevant facts, the issue of an appellant's standing should be remanded to the district court. In re Dykes, No. 93-7235, 1993 WL 490865, at *3. If there is no dispute in the relevant facts, the circuit court may go ahead and decide the issue. Id. We conclude, as we explain below, that Mr. Lopez did not allege sufficient facts in No. 93-2042B, or No. 93-2141 either to raise a fact

question for remand or to establish jurisdiction and, therefore, these appeals are dismissed for lack of standing.

Mr. Lopez asserts he has standing to appeal from all three bankruptcy court orders on the basis he is a creditor of the estates. The parties dispute whether Mr. Lopez is a creditor. Mr. Lopez, an accountant with a business degree, became, post-petition, a professional employee of the debtor companies pursuant to 11 U.S.C. § 327 and the approval of the bankruptcy court. Addendum to Appellant's Br. on Standing, Docs. 1 and 2. Because Mr. Lopez's claim against the estates is post-petition,[3] technically, he is not a creditor. See 11 U.S.C.A. § 101(10). However, whether or not Mr. Lopez is a creditor misses the point.

To have standing to appeal, Mr. Lopez must demonstrate he has a direct and adverse pecuniary interest in each order he challenges.

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[3] Mr. Lopez apparently does have an administrative claim against the estates.

See International Trade Admin. v. Rensselaer Polytechnic Inst., 936 F.2d 744, 746-48 (2d Cir. 1991) (holding that bank with secured interest in lease which was subject of bankruptcy court order had standing to challenge that order); Brady v. Andrew (In re Commercial W. Fin. Corp.), 761 F.2d 1329, 1334-35 (9th Cir. 1985) (holding that, where bankruptcy plan eliminated the interests of certain investors, the investors had standing to appeal from order confirming that plan); Salomon v. Logan (In re International Envtl. Dynamics, Inc.), 718 F.2d 322, 326 (9th Cir. 1983) (holding that claimant who sought part of limited funds had standing to appeal from order disposing of those funds); cf. Pignato v. Dein Host, Inc. (In re Dein Host, Inc.), 835 F.2d 402, 404-07 (1st Cir. 1987) (holding that, where direct injury caused by bankruptcy court order was to corporation, corporate officer who was harmed only indirectly as shareholder lacked standing to appeal).

In No. 93-2042A, Mr. Lopez challenges a

bankruptcy court order in which the judge refused to recuse. Mr. Lopez does not cite, nor have we found, any cases that clearly support his assertion of standing to challenge this order. Arguably, though, he can show a direct and adverse pecuniary interest in this order, because one effect of the bankruptcy judge's refusal to recuse was to leave in place an order converting the proceeding from Chapter 11 to Chapter 7, and the conversion effectively terminated Mr. Lopez's employment with the debtors. Assuming Mr. Lopez has standing, he has failed to demonstrate his entitlement to relief.

The denial of a motion to recuse is reviewed for an abuse of discretion. Hinman v. Rogers, 831 F.2d 937, 938 (10th Cir. 1987). Under § 455, a judge should recuse if "a reasonable person, knowing all the relevant facts, would harbor doubts about the judge's impartiality." Id. at 939. However, "factual allegations do not have to be taken as true,"

and "[t]here is as much obligation for a judge not to recuse when there is no occasion ... to do so as there is ... to [recuse] when there is." Id. "A judge should not recuse ... on unsupported, irrational, or highly tenuous speculation." Id.

Mr. Lopez asserts that the bankruptcy judge was biased against him because, at a hearing on the motion for conversion from Chapter 11 to Chapter 7, opposing counsel offered into evidence a letter from Mr. Lopez to the State of New Mexico in which Mr. Lopez accused the State of having caused the death of the debtors' chief accountant by accusing him of failing to file tax returns for the debtors. After reading the letter, Mr. Lopez says, the bankruptcy judge started ruling against him. Mr. Lopez adds that opposing counsel offered the offending letter again at a later hearing. Except that it is clear that the judge's subsequent decisions were adverse to Mr. Lopez, however, Mr. Lopez's argument that the judge was biased is

unsupported in fact. In addition, and as the district judge correctly pointed out, an allegation of personal bias must be based on an "extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." United States v. Grinnell Corp., 384 U.S. 563, 583 (1966). Adverse rulings alone are insufficient grounds for disqualification, Green v. Dorrell, 969 F.2d 915, 919 (10th Cir. 1992), cert. denied, 113 S. Ct. 1336 (1993), as is evidence that the judge criticized or was angry with a party, United States v. Troxell, 887 F.2d 830, 833-34 (7th Cir. 1989). Therefore, the bankruptcy judge did not abuse his discretion by refusing to recuse himself.

To obtain mandamus relief, Mr. Lopez must demonstrate a "'clear and indisputable'" right to relief. Will v. United States, 389 U.S. 90, 96 (1967) (quoting Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 384 (1953)). Because we conclude the bankruptcy judge did not abuse

his discretion in refusing to recuse himself, it follows that Mr. Lopez cannot meet the higher mandamus standard.

Mr. Lopez lacks standing to challenge the orders appealed from in Nos. 93-2042B and 93-2141. In No. 93-2042B, Mr. Lopez challenges a bankruptcy court order that lifted the automatic stay as to Val & Sons so that it could foreclose on its mortgage on the debtors' building. Although Mr. Lopez apparently has an indirect interest in the challenged order because any disposition of estate assets presumably affects the eventual payment or nonpayment of his administrative claim, Mr. Lopez asserts no interest in the building which was subject to foreclosure due to the bankruptcy court's order lifting the automatic stay. Therefore, he has failed to assert a direct and adverse pecuniary interest in the order appealed from in No. 93-2042B, and has failed to establish standing.

It is also true that the automatic stay is for the sole benefit of the debtors' estate.

Tilley v. Vucurevich (In re Pecan Groves of Ariz.), 951 F.2d 242, 245 (9th Cir. 1991). The trustee may challenge an order lifting the stay, but it could subvert the trustee's powers to allow a creditor to appeal if the trustee chooses not to. Id. Here, the trustee stipulated to lifting the stay in the first place.

In No. 93-2141, Mr. Lopez appeals from an order granting fees to the Chapter 7 trustee's accountant. As indicated above, although Mr. Lopez apparently has an indirect interest in any order disposing of the debtors' funds, he asserts no direct interest in the actual funds distributed by the challenged order. Cf. In re International Envtl. Dynamics, Inc., 718 F.2d at 326 (claimant sought portion of funds disposed of by challenged order). That is, if paying the Chapter 7 accountant means that Mr. Lopez will not get paid, or if not paying the Chapter 7 accountant means that Mr. Lopez will get paid, Mr. Lopez has failed to demonstrate how either

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: AMERICAN READY MIX, INC., Debtor, and ALBUQUERQUE SAND & GRAVEL, INC., d/b/a AMERICAN SAND & GRAVEL, INC., Debtor.	)	
ANDREW LEO LOPEZ, Appellant, v. DANIEL J. BEHLES, Trustee; WESTERN BANK; ANTHONY TAFOYA, Debtor in Possession, Appellees.	)	No. 93-2257 (D.C. No. CIV-91-532-JP) (D. N.M.)

ORDER AND JUDGMENT*

Before ANDERSON and KELLY, Circuit Judges, and BELOT,** District Judge.

**Honorable Monti L. Belot, District Judge, United States District Court for the District of Kansas, sitting by designation.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.R.D. 470.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 24(1); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Appellant Andrew Leo Lopez, representing himself, challenges an order of the bankruptcy court which approved a stipulated order lifting the automatic stay in the underlying consolidated bankruptcies as to appellee Western Bank so that Western could foreclose on its security interest in some equipment belonging to one of the debtors. Appellant, formerly a professional employee of the debtors, is not a "person aggrieved" by the order he challenges, and he therefore lacks standing to appeal. See

Lopez v. Behles (In re American Ready Mix, Inc.), 14 F.3d 1497, 1500 (10th Cir. 1994) (appellant must demonstrate direct and adverse pecuniary interest in order appealed from).

Therefore, this appeal is DISMISSED.

The mandate shall issue forthwith.

Entered for the Court

Monti L. Belot
District Judge

APPENDIX C

Statutes Involved

11 U.S.C. § 101(5) "Claim" means

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to equitable remedy for breach of performance if such breach gives rise to a right of payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

11 U.S.C. § 101(10)(A) "Creditor" means

Entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor.

11 U.S.C. § 101(14)(E) Disinterested persons means

Person that does not have an interest materially adverse to the interest of the estate

or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor or an investment banker specified in subparagraph (B)(C) of this paragraph, or for any other reason;

11 U.S.C. § 301 Voluntary cases

A voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter. The commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter.

11 U.S.C. § 327(a) Employment of professional persons

Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, and other professional persons, that do not hold or represent an interest adverse to the estate, and that are

disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

11 U.S.C. § 348(a) Effect of conversion

Conversion of a case under one chapter of this title to a case under another chapter of this title constitutes an order for relief under the chapter to which the case is converted....

11 U.S.C. § 362 Automatic stay

Except as provided in subsection (b) of this section, a petition filed under § 301, § 302, or § 303 of this title or an application filed under section 5(a)(3) of the Securities Investor Act of 1970 (15 U.S.C. 78eee(a)(3), operates as a stay applicable to all entities, of --

11 U.S.C. § 363(b)(1) Use, sale, or lease of property

The trustee, after notice and hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.

11 U.S.C. § 501(a) Filing of proofs of claims or interests

A creditor or an indenture trustee may file a proof of claim.

11 U.S.C. § 502(a) Allowance of claims or interests

A claim or interest, proof of which is filed under § 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under Chapter 7 of this title objects.

11 U.S.C. § 503(b)(4) Allowance of administrative expenses

After notice and hearing, there shall be allowed administrative expenses, other than claims allowed under § 502(f) of this title including --

(4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under paragraph (3) of this subsection

based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant.

11 U.S.C. § 507(a)(1) Priorities

The following expenses and claims have priority in the following order:

(1) First, administrative expenses allowed under § 503(b) of this title, and any fees and charges assessed against the estate under chapter 123 of title 28.

11 U.S.C. § 1109(b) Right to be heard

A party in interest, including the debtor, the trustee, a creditor's committee, an equity security holder's committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.

28 U.S.C. § 455(a) Disqualification of justice, judge, or magistrate

Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C. § 455(b)(1) Disqualification of justice, judge, or magistrate

He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

28 U.S.C. § 1293(b) Bankruptcy appeals

Notwithstanding section 1482 of this title [28 U.S.C. § 1482] a court of appeals shall have jurisdiction of an appeal from a final judgment, order, or decree of an appellate panel created under section 160 [28 U.S.C. § 160] or a district court of the United States or from a final judgment, order, or decree of a bankruptcy court of the United States if the parties to such appeal agree to a direct appeal to the

court of appeals.

28 U.S.C. § 1651(a) Writs

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Fed. R. Civ. P. § 24(a)(2) Intervention

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.